No. 629

In the Supreme Court of the United States

OCTOBER TERM, 1938

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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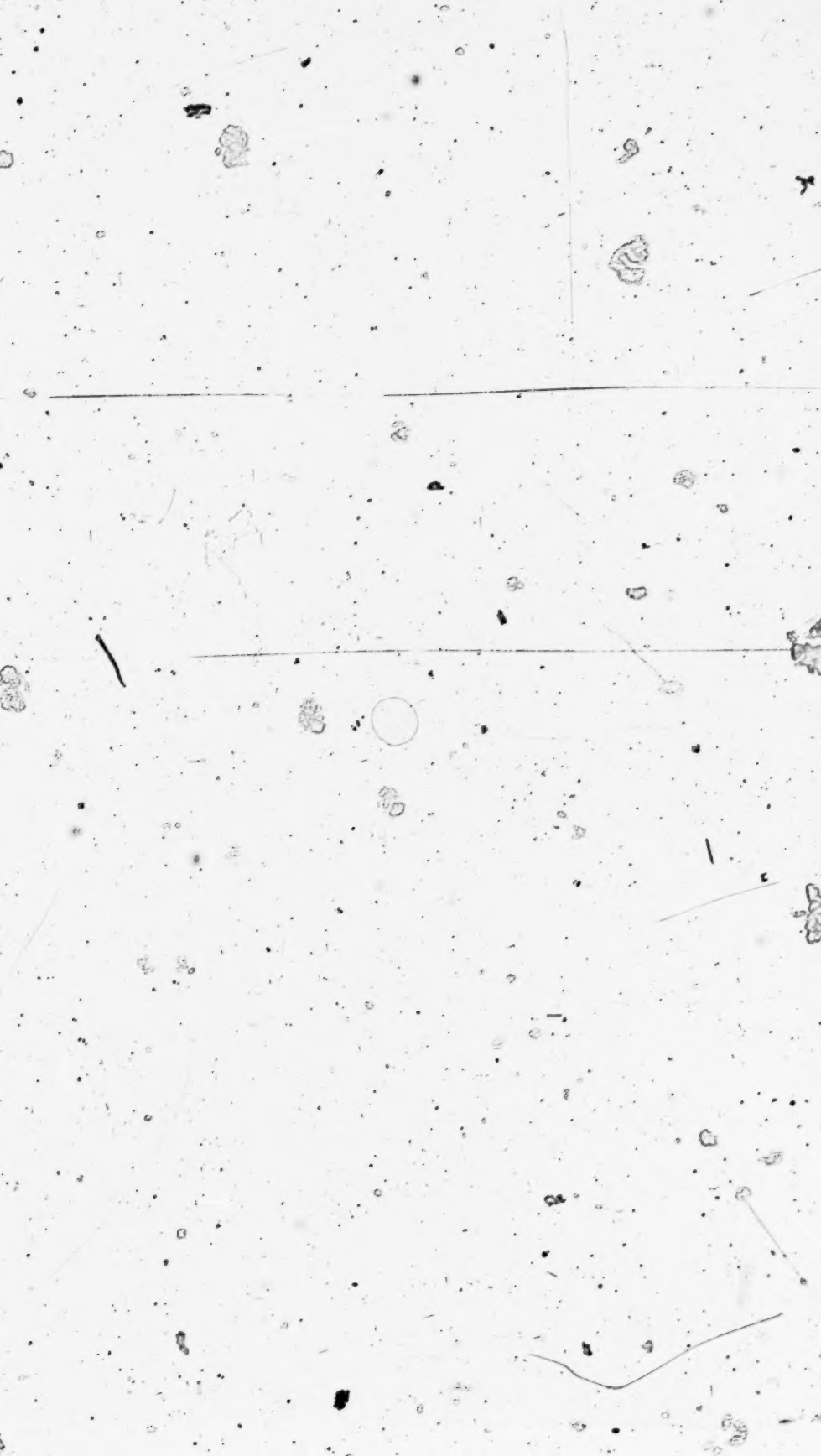

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The Solicitor General, on behalf of the Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, and Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on October 31,

1938, which affirmed an order entered by the United States District Court for the District of Columbia striking parts of the petitioners' answers and entering a decree against them *pro confesso*.

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 97–98). The opinion of the Court of Appeals for the District of Columbia (R. 106) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered October 31, 1938 (R. 121). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to various agreements with the Commercial National Bank providing for the securing of such deposits, deposits were made in the accounts of the Secretary of War, in behalf of the Canal Zone; the Inland Waterways Corporation; and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were paid to the depositors, either by turning over the security or from the proceeds of such security. The receiver, assailing the validity of the agreements

to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors. Two principal questions arise:

1. As to each petitioner, is the United States an indispensable party defendant?

2. As to each petitioner, under the circumstances of this case, was the giving of security by the national bank invalid?[1]

STATUTES INVOLVED

These are set out in Appendix A to the petition in *Woodring* v. *Wardell*, No. 628, this Term.

STATEMENT

At various times the Inland Waterways Corporation, the United States Shipping Board Merchant Fleet Corporation, and the Secretary of War entered into agreements with the Commercial National Bank of Washington, D. C., for the opening of deposit accounts and for the pledging by that bank of certain of its assets to secure the payment of the deposits so made. The bank suspended operations on February 27, 1933, and was found and determined to be insolvent by the Comptroller of

[1] If certiorari is granted, it is proposed also to submit arguments on the question whether, if the deposits were invalid, under R. S. Sec. 5497, the bank became a trustee *ex maleficio* of the funds here involved; and whether the court below had jurisdiction to entertain a suit in tort against the Inland Waterways Corporation.

the Currency, who, on February 28, 1933, appointed a receiver (R. 3).

At the time of the suspension of operations the credit balance of the Inland Waterways Corporation in the Savings Account was $271,113.05, and its balance in the Checking Account was $211,543.52 (R. 3). The funds involved were apparently derived either from moneys received from the operations of the corporation[2] or from moneys appropriated by Congress to meet deficits in its fund (R. 79). The par value of the securities pledged by the bank to the corporation at the time of suspension was $500,000 (R. 3). The receiver redeemed certain of the bonds for $245,000 cash, and the remaining securities were sold by the corporation and the amount in excess of the deposits was paid by the corporation to the receiver (R. 74–75).

On December 1, 1921, an account was opened under the name of the "United States Shipping Board Emergency Fleet Corporation, Agent Deposit Account" (R. 29–30). The name of this account subsequently was changed to "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account." The bank was advised that the Fleet Corporation was acting solely as agent for the United States Shipping Board and

[2] The corporation, with stock wholly owned by the United States, was created as an instrument for the execution of certain functions of the Secretary of War in promoting inland waterway transportation, Act of June 3, 1924, 43 Stat. 360, c. 98 (R. 76–79).

that it had no beneficial interest in the account (R. 30). The moneys which comprised this account were public moneys of the United States derived from the sale of government vessels, revenues from the operation of government vessels, rentals from real estate owned by the United States and miscellaneous revenues of the United States (R. 38). The funds in this account were withdrawn by checks of $50,000 and $100,000 and deposited with the Treasurer of the United States, where they became commingled with other funds of the United States (R. 38).

On January 14, 1926, another account was opened in the name of the "United States Shipping Board Merchant Fleet Corporation, Agent Good Faith Deposit Account" (R. 30). The funds in this account were wholly and exclusively derived from deposits made as security for performance of sales or purchase proposals. No checks were drawn on this account except to unsuccessful bidders for the return of their deposit or to the Treasurer of the United States when the bidder's deposit was forfeited or credited on the transaction (R. 39).

To secure these deposits, the Fleet Corporation, by agreement concluded with the bank, received certain pledged assets of the bank to insure the repayment of the deposits (R. 1). At the time the bank suspended business, the Fleet Corporation had on deposit $264,302.16 in the Agent Deposit Account and $144,995.12 in the Agent Good Faith

Deposit Account (R. 30). The receiver paid to the Fleet Corporation $281,695.31 to redeem certain securities, and the residue was sold by the Fleet Corporation, which retained the sum of $125,460.94 as principal and $5,515.49 as interest (R. 33–34).

The Secretary of War had on deposit with the bank an account guaranteed by pledged assets of the bank. At the time of the suspension of the bank the credit balance in the account was $711,622.92 (R. 6, 83). This was composed almost entirely of deposit money order funds and money order funds received by the Canal Zone postal service (R. 84). The par value of the pledged securities at that time was $791,000.00 (R. 6, 83). After the closing of the bank, the Secretary of War directed the General Purchasing Officer of the Panama Canal to take over the pledged bonds, to which the receiver acceded (R. 6–7, 83).

On June 4, 1936, the receiver brought suit in the District Court for the District of Columbia seeking to recover from the petitioners any amount in excess of that which they would have received through dividends paid to general creditors.[3] The petition-

[3] A suit involving many of the issues here presented was commenced by a depositor of the bank. It was considered by the court below in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, wherein it was held that assets pledged to the Fleet Corporation and to the Attorney General as Alien Property Custodian might be recovered. This Court granted certiorari, but limited the writ to the question of the right of a depositor to institute suit without prior demand being made to institute such suit on the receiver and the Comptroller of

ers filed separate answers. The receiver moved to strike out certain portions of those answers and for the entry of a decree *pro confesso* (R. 93–95). That motion was granted, and the decree was entered against the various petitioners (R. 97–98). On appeal the Court of Appeals for the District of Columbia affirmed.

SPECIFICATION OF ERRORS TO BE URGED[1]

The court below erred:

I.

IN RESPECT OF THE INLAND WATERWAYS CORPORATION

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation, which is an instrumentality of the United States created by an Act of Congress to perform functions formerly entrusted to the Secretary of War.

2. In holding that the Inland Waterways Corporation is subject to a suit in tort.

3. In failing to hold that the money in question was public money of the United States.

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the Currency. That right was affirmed. *O'Connor* v. *Rhodes*, 297 U. S. 383. On remand the District Court is holding the *Rhodes* case in abeyance pending the outcome of the present suit.

[1] The petitioners below contended that the bill of complaint was multifarious, and still believe such to be the case. Owing to the fact that the funds deposited by the three petitioners differed in certain aspects, we are specifying the errors separately in respect of each of them.

4. In failing to hold that the United States is an indispensable party to the suit.

5. In failing to hold that the bank became a trustee *ex maleficio* with respect to the funds here involved.

6. In affirming the judgment against the petitioners.

II

IN RESPECT OF THE UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION

7. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation, which is an instrumentality of the United States created by an Act of Congress to perform functions of a public character.

8. In failing to hold that the moneys in question were public moneys of the United States.

9. In failing to hold that the United States is an indispensable party to this suit.

10. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

11. In affirming the judgment against the petitioners.

III

IN RESPECT OF HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH (CANAL ZONE DEPOSITS)

12. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up of moneys received from

deposit money order accounts and postal money order accounts of the Panama Canal.

13. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

14. In failing to hold that the laws applicable to postal money order accounts in the United States were applicable to the postal accounts of the Canal Zone.

15. In failing to hold that the moneys in question were public moneys of the United States.

16. In failing to hold that the United States is an indispensable party to this suit.

17. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

18. In affirming the judgment apainst the petitioners.

REASONS FOR GRANTING THE WRIT

Pursuant to several agreements the Commercial National Bank arranged to secure the various funds in the deposit accounts of the Secretary of War, in behalf of the Canal Zone; the Inland Waterways Corporation; and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were recovered by the depositors out of the security or the proceeds of the sale thereof. The receiver, attack-

ing the validity of the agreements to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors.

The principal contentions of the petitioners are that in the circumstances of this case the giving of security by the national bank was valid, and that the District Court was without jurisdiction to entertain the suit since it is in effect one brought against the United States and in which the United States is an indispensable party defendant.[5]

In view of the complexity of the various accounts involved in this record, and for the sake of simplicity and clarity, we have set out the reasons for granting the writ of certiorari in the petition in the companion case of *Woodring et al.* v. *Wardell*, No. 628 (filed contemporaneously with the present petition), where only Canal Zone funds are involved. We respectfully refer the Court to the petition filed in that case for a statement of the reasons for granting the writ of certiorari in this case. In the present case it is again submitted, as to Secretary Woodring and the other petitioners, that the United States is an indispensable party defendant as the

[5] If certiorari is granted, it is proposed also to contend that if the deposits were invalid, under R. S. Sec. 5497, the bank became a trustee *ex maleficio*, so that the repayment of the funds did not constitute a preference; and that the District Court did not have jurisdiction to maintain a suit in tort against the Inland Waterways Corporation.

party primarily affected by the decision below,[6] and that, in the circumstances of this case, no invalidity attaches to the giving of security by the bank in accordance with the custom long settled with respect to governmental agencies and known to the officers of the Treasury Department, including the Comptroller of the Currency.[7] The widespread importance of the question to governmental agencies is indicated by the presence in this case of the petitioners other than the Canal Zone, and note may also be taken of the deposit of the Philippine Islands indicated in the pleading below (R. 9) and now awaiting trial.

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[6] As the court below noted, however, the position of the petitioning corporations is affected by the statutory provisions that they have the power to sue and be sued in their corporate name. However, the Inland Waterways Corporation is only a corporate aspect of the Secretary of War, its sole incorporator, and is under his management and control (R. 76–79). The corporation has no board of directors in the ordinary sense, but only a board to advise the Secretary of War and to make recommendations to him. Act of June 3, 1924, c. 243, 43 Stat. 360, Secs. 2; 4, as amended, 49 U. S. C., Secs. 152, 154. Moreover, this corporation was incorporated by an Act of Congress (Act of June 3, 1924, c. 243, Sec. 5, as amended, 49 U. S. C., Sec. 155), and the general provision giving it power to sue and be sued may not extend to an action for conversion, sounding in tort. See *Lyle* v. *National Home, etc.*, 170 Fed. 842 (C. C. E. D. Tenn.); see brief for respondent in *Keifer and Keifer* v. *Reconstruction Finance Corporation et al.*, No. 64, present Term, now pending on certiorari to review 97 F. (2d) 812 (C. C. A. 8th).

[7] The practice and knowledge thereof are alleged in the answers at R. 42, 75, 85.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JANUARY 1939.

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